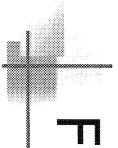


Private Property Rights Select Committee to Protect

September 14, 2005 Karen M. Camechis



Fundamental Question

transferred to another private entity? property in Florida may be taken and valid public purpose for which private jobs and enhancing the tax base -- a include, but is not limited to, creating Is economic development -- which may

Our Best Answer

decision that explicitly prohibits a taking of a taking for purposes of economic development statutes are amended, the question of whether development. Unless Florida's Constitution or private property by a city or county for the declared public purpose of economic directly addressed by the Florida Supreme is permissible will remain unanswered until There is not a statute or Florida Supreme Court

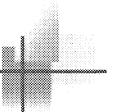


- Traditional takings of private property
- Inverse Condemnation
- In-depth analysis of compensation Partial takings of private property

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- S General principles of eminent domain
- Kelo v. City of New London
- Outline of Florida eminent domain law Impact of Kelo on Florida law
- Whether a Kelo-type taking is allowed or prohibited under current Florida law



General Principles

- "Eminent domain" has been described as the fundamental power of the sovereign to take owner's consent, private property for a public use without the
- The power of eminent domain is absolute, Constitutions, and every property owner except as limited by the Federal and State right of the government to take that property. holds title to property subject to the superior



for public use, without just compensation of law; nor shall private property be taken liberty, or property, without due process No person shall be .. deprived of life,

U.S. Const. amend. V.



'It is not essential that the entire community, enjoy or participate in any improvement in any literal requirement that condemned nor even any considerable portion, ... directly property be put into use for the general public. order [for it] to constitute a public use." The "[U.S. Supreme Court] long ago rejected

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 244 (1984), citing Rindge Co. v. Los Angeles, 262 U.S. 700 (1923).

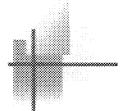


well-nigh conclusive." interest has been declared in terms legislature has spoken, the public The court concluded that 'when the

Berman v. Parker, 348 U.S. 26 (1954).

(1984)Hawaii Housing Authority v. Midkiff

conceivable public purpose, the eminent domain power is "[W]here the exercise of the proscribed by the Public Use compensated taking to be Court has never held a Clause." rationally related to a



Kelo v. City of New London (2005)

jobs and enhancing the tax base -- a government and transferred to another or blighted area, may be taken by property, that is not located in a slum valid public purpose for which private include, but is not inited to, creating Is economic development -- which may private entity?



party B, even though A is paid just purpose of transferring it to private of private party A for the sole sovereign may not take the property compensation. It has long been accepted that the



ndividuals. on a particular class of identifiable would be executed pursuant to a The Court found the Kelo takings purpose, such as bestowing a benefit plan and concluded that there was "carefully considered" development no evidence of an illegitimate



justify the use of the takings power. Berman, 348 U.S. 26, 75 S.Ct. 98; Midkiff, 467 U.S. 229, 104 S.Ct. 2321; Ruckelshaus v. Monsanto Co., 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815. defined [the public purpose concept] policy of deference to legislative broadly, reflecting its longstanding "Without exception, the Court has judgments as to what public needs

as a Public Purpose Kelo on Economic Development

"Promoting economic development is a traditional and long accepted distinguishing economic development function of government. There is, we have recognized." from the other public purposes that moreover, no principled way of

Restrictions Permitted Kelo on Further State

"We emphasize that nothing in our opinion upon which takings may be exercised." domain statutes that carefully limit the grounds law, while others are expressed in state eminent established as a matter of state constitutional precludes any State from placing further baseline. Some of these requirements have been requirements that are stricter than the federal Indeed, many States already impose 'public use' restrictions on its exercise of the takings power.



- and available to the owner. secured by deposit in the registry of the court compensation therefor paid to each owner or except for a public purpose and with full (a) No private property shall be taken
- drainage of the land of one person over or of easements, by like proceedings, for the (b) Provision may be made by law for the taking through the land of another. Art., § 6, Fla. Const.





- have been fulfilled public purpose and that any statutory requirements Demonstrate that a taking is pursued for a valid
- the <u>declared</u> public purpose and Offer "some" evidence showing that the taking is "reasonably", not absolutely, necessary to accomplish
- Pay the property owner full compensation as determined by a 12-member jury

Delegation of Authority

domain to an entity before the to exercise power of eminent With the exception of cities, and entity attempts to take private possibly charter counties, the property for any purpose. Legislature must delegate authority

Home Rule Powers Constitutional Provision Granting

- powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Art. VIII, § 2(b), Fla. Const. Municipalities shall have governmental, corporate and proprietary
- local self-government **not inconsistent with general law**, or with special law approved by vote of the electors. The governing and municipal ordinances. Art. VIII, § 1(g), Fla. Const. body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall Counties operating under county charters shall have all powers of provide which shall prevail in the event of conflict between county

Spat is a found to purpose in Florida?

peculiar circumstances." definition of a 'public' as distinguished as a rule, have attempted **no** judicial to no little judicial consideration. Courts "What is a public purpose has given rise each case to be determined by its owr from a 'private' purpose, but have left

Marvin v. Housing Authority of Jacksonville, 133 Fla. 590, 183 So. 145 (Fla. 1938); citing Green v. Frazier, 253 U.S. 233 (1920).

County (1947) Peavy-Wilson Lumber Co. v. Brevard

"The best authority limits this rule to the securing of something that is basically essential, such as public buildings to carry on governmental functions, public roads, playgrounds in congested areas...At any rate this phase of the law is not static. It advances with caution in keeping with the schools, drainage projects, parks and Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 31 So.2d 483 (Fla. 1947). conformity with constitutional law." Peavyrequired needs of society and in



- private development there would be no public need for the parking cited as the **sole basis** for condemnation." Therefore, the Court rejected "the proposed and alleged public purpose **under the particular circumstances here.**" Baycol, Inc. v. Downtown

 Development Authority of City of Fort Lauderdale, 315 So.2d 451 (Fla. 1975). The Supreme Court determined that "without the
- dog. "State v. Miami Beach Redevelopment Agency, 392 So.2d 875 (Fla. 1980), summarizing Baycol. But parking was incidental to the predominant private use of the retail shops. The tail was wagging the demonstrated need for the parking garage. Parking was the purported public use underlying the project. the private commercial activities, there was no The Court "concluded from the record that without



sought is for a necessary public use. It is this public Baycol, Inc. v. Downtown Dev. Auth. of City of Fort property of our citizens cannot be confiscated.... property, and without which proper purpose the private constitutes the justification for the taking of private predicated upon the proposition that the private property "We have been long committed in a consistent series of Lauderdale, 315 So.2d 451 (Fla. 1975). constitution for an assertion of the public interest and is **private use**; it is, rather, the means provided by the employed to take private property for a predominantly cases to the proposition that eminent domain cannot be nature of the need and necessity involved that



"The term 'public purpose' does not a tangible, foreseeable way." Dep't of specific public function, i.e. a road or read more broadly to include concept of public purpose must be other right of way. Rather, the projects which benefit the state in Transp. v. Fortune Federal Sav. and Loan Ass'n, 532 So.2d 1267 (Fla. 1988). mean simply that the land is used for a



domain in furtherance of the section 10, then the use of eminent sale of bonds under article VII, expenditure of public funds and the "If a project serves a public project is also proper." purpose sufficient to allow the



- declared public purpose is resolved by the courts. The ultimate question of the validity of a legislatively Nonetheless, the role of the judiciary is narrow.
- In order to invalidate a statute that includes a stated the Legislature. and so clearly erroneous as to be beyond the power of show that the stated purpose is arbitrary and capricious public purpose, the party challenging that statute must
- The presumption is in favor of a legislative declaration of public purpose and the courts will not interfere with the declaration unless the use is clearly and manifestly of a private character.



- Private property may be taken only when it is purpose. reasonably necessary to accomplish the declared public
- Whether necessity exists for taking a particular property is ultimately a judicial question.
- First, the condemning authority must offer some evidence of a reasonable necessity for the taking.
- Once a reasonable necessity is shown, the exercise of the condemning authority's discretion will not be abuse of discretion. disturbed in the absence of illegality, bad faith, or gross



- A property owner is entitled to full and just compensation.
- A twelve-member jury determines the amount of compensation.
- function that cannot be performed by the Legislature directly or indirectly. Determining the amount of just compensation is a judicial
- The Legislature may create an obligation to pay more than what the courts might consider full compensation.
- Generally, the just and full compensation due is the fair market value of the property at the time of the taking.
- A petitioner must pay reasonable attorney's fees and costs
- of moving personal property, including impact fees, A landowner is entitled to compensation for the reasonable cost
- Business damages are available only in the case of partial takings, not takings of a full parcel



- Arguably, the Kelo decision has no DIRECT
- What remains uncertain is whether Kelo will purposes. private property for economic development future attempt by cities or counties to take interpretation and application of the law in a have an indirect impact on the Florida courts' impact on Florida's eminent domain law.



- Whether a government taking of private for the purpose of economic development is Community Redevelopment Act; and permitted outside the context of Florida's property in a non-blighted or non-slum area
- Whether Kelo-type takings are occurring within the context of Florida's Community Redevelopment Act.



- development. areas for the purpose of economic private property in non-blighted or non-slum authorizes a governmental entity to take Unlike Connecticut, the Florida Legislature has NOT enacted a statute that expressly
- However, cities and perhaps charter counties unless expressly prohibited by the Legislature which may include economic development, property for any municipal or county purpose, have constitutional home rule power to take



Purposes Prohibited in Florida? Are Takings for Economic Development

- declared purpose of economic development, property in non-blighted or non-slum areas for the prohibiting cities or counties from taking private There is not a statutory or constitutional provision
- The Florida Supreme Court has not considered a case development, rule powers for the <u>declared</u> purpose of economic or non-slum area by a city or county under their home involving a taking of private property in a non-blighted
- We can only speculate as to how the Court would rule development purposes. on a future case involving a taking for purely economic



"We hold that chapter 163 ... authorizing for the Court to determine." State v. Miami Beach cataclysmic demolition and redesign of constitutional. The wisdom of authorizing the furtherance of a public purpose and is and substantial private and commercial eminent domain for acquisition and clearance, redevelopment projects involving ... the use of Redevelopment Agency, 392 So.2d 875 (Fla. 1980). neighborhoods or even whole districts is not uses after redevelopment, is in

Statutory Definition of **'Blighted Area**

"Blighted area" means an area in which there are a substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or property, and in which two or more of the following factors are present:

- (a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities;
- over the 5 years prior to the finding of such conditions; (b) Aggregate assessed values of real property in the area for ad valorem tax purposes have failed to show any appreciable increase
- (c) Faulty lot layout in relation to size, adequacy, accessibility, or usefulness;
- (d) Unsanitary or unsafe conditions;
- e) Deterioration of site or other improvements;
- (f) Inadequate and outdated building density patterns;
- (g) Falling lease rates per square foot of office, commercial, or industrial space compared to the remainder of the county or municipality;
- (h) Tax or special assessment delinquency exceeding the fair value of the land;
- Residential and commercial vacancy rates higher in the area than in the remainder of the county or municipality
- Incidence of crime in the area higher than in the remainder of the county or municipality;
- (k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality;
- the county or municipality; () A greater number of violations of the Florida Building Code in the area than the number of violations recorded in the remainder of
- nazardous area; or (m) Diversity of ownership or defective or unusual conditions of title which prevent the free alienability of land within the deteriorated or
- (n) Governmentally owned property with adverse environmental conditions caused by a public or private entity

However, the term "blighted area" also means any area in which at least one of the factors identified in paragraphs (a) through (n) are present and all taxing authorities subject to s. 163.387(2)(a) agree, either by interlocal agreement or agreements with the agency or by resolution, that the area is blighted. Such agreement or resolution shall only determine that the area is blighted. For purposes of qualifying for the tax credits authorized in chapter 220, "blighted area" means an area as defined in this subsection. S. 163.340(8), F.S.



- the same level of blight exists when it seeks to condemn property as was present when the redevelopment plan was initially adopted. A community redevelopment agency is not required to show that
- Designations of blight or slum do not expire after a given period of subject to taking for an indefinite, and potentially long, period of time; therefore, property located within a redevelopment area is
- agency. and develop the property unless approved by the redevelopment If a public purpose and reasonable necessity exist for the taking of has begun to develop the property in accordance with the redevelopment plan does not give the owner an option to retain property for slum or blight clearance, the fact that a landowner
- It is the characteristic of a slum or blighted area that controls whether property within the area is subject to taking, not the condition of an individual parcel.



will remain so unless the Florida development purposes is permissible in restrict such takings. Constitution or Statutes are amended to whether a taking for economic Florida lies squarely in the judiciary, and The bottom line is: the decision as to

Key Point #2

property would be transferred to private purpose of economic development when the Constitution a taking of private property in a Court considered and approved under the U.S. however, for the first time, the U.S. Supreme principles of Florida's eminent domain law; Darles. non-blighted or non-slum area for the declared Kelo did not directly alter the fundamental



an indirect impact on the Florida of the law in a future attempt by courts' interpretation and application purposes is unknown. cities or counties to take private property for economic development Whether the Kelo decision will have

Key Point #4

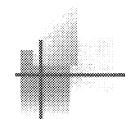
statutory home rule power. purposes under their constitutional and appear to have the underlying authority to purposes; therefore, cities and counties explicitly prohibits the taking of private property for economic development initiate a taking for economic development There is not a Florida statute that



the Court will uphold or prohibit such for the declared purpose of takings in the future. economic development. Therefore, considered a case involving a taking we can only speculate as to whether The Florida Supreme Court has not

Key Point #6

interests in redevelopment. substantial involvement of private concluding that the elimination and Community Redevelopment Act, purpose is not invalidated by the public purpose, and that the public prevention of slum and blight serve a The Florida Supreme Court upheld the



Key Point #7

includes a broad definition of "blighted property that does not appear to be area," which may permit the taking of property rights advocates claim that, blighted to the average person. Private The Community Redevelopment Act under the current definition of "blight," Kelo-type takings are occurring in



domain, "CRAs will have much difficulty many landowners are involved". assembly process; however, they predict that, without the power of eminent assert that eminent domain is typically a in assembling land especially where last resort to complete the land Florida Redevelopment Association The Florida League of Cities and the

(WHEW!)